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No. 87-154

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOSHUA DeSHANEY, a minor,
by his guardian ad litem,
CURRY FIRST, ESQUIRE, and
MELODY DeSHANEY,

Petitioners,

v.

WINNEBAGO COUNTY DEPARTMENT OF
SOCIAL SERVICES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF, AND BRIEF OF MASSACHUSETTS COMMITTEE FOR CHILDREN AND YOUTH, IN SUPPORT OF PETITIONERS

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MOTION OF THE MASSACHUSETTS COMMITTEE FOR CHILDREN AND YOUTH FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Massachusetts Committee for Children and Youth ("MCCY") respectfully moves, pursuant to Rule 36 of the Rules of this Court, for leave to file the attached brief as amicus curiae.

The petitioners have consented to the filing of this brief. The respondents have neither consented, nor refused consent to the filing.

INTEREST OF MCCY

The Massachusetts Committee For Children and Youth ("MCCY") is a non-profit organization, headquartered in Boston, which has worked for three decades, through advocacy, to improve the lives of Massachusetts' most vulnerable children, including abused and neglected children, foster children, drug-addicted newborns, adolescents facing depression and suicide, abandoned and runaway children, and homeless children and their families.

The Court's decision in this case will have broad implications for the welfare of children. As MCCY has substantial experience and expertise in the field of child abuse, it believes

that its brief can make a contribution of material assistance to the Court. MCCY's brief addresses the characteristics of abusing families, the standard of child abuse investigation and intervention, and the impact the decision in this case will have on the nation's children.

Respectfully submitted,

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BRIEF OF MASSACHUSETTS COMMITTEE FOR CHILDREN AND YOUTH IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS IN THE CAUSE BEFORE THE COURT

The Massachusetts Committee For Children and Youth ("MCCY") is a non-profit organization, headquartered in Boston, which has worked for three decades, through advocacy, to improve the lives of Massachusetts' most vulnerable children, including abused and neglected children, foster children, drug-addicted newborns, adolescents facing depression and suicide, abandoned and runaway children, and homeless children and their families.

The President of MCCY, Dr. Eli Newberger, is the chief of the clinic at Boston's Children's Hospital responsible for treatment of cases of abused and neglected children. Dr. Newberger has written numerous books and articles on the field of child

abuse. Members of MCCY's Board include child advocates and professionals in the child welfare field. MCCY has issued numerous studies in the fields of child welfare, including reports on child abuse prevention, adolescent services, and services for homeless children.

MCCY submits this amicus curiae brief because it believes that a correct interpretation of 42 U.S.C. §1983, as asserted by the plaintiff, will be in the public interest and will benefit abused children.

SUMMARY OF THE ARGUMENT

In this brief, MCCY contends that:

1. The intervention in Joshua's case by the Department and Kemmeter failed to meet fundamental and clearly articulated standards of practice. Under those standards, the facts of the

plaintiff's case support a finding of deliberate indifference toward Joshua.

2. The intervention in Joshua's family life by Kemmeter and the Department profoundly affected the dynamics of the family and, more likely than not, increased the risk to Joshua.

3. Under well-established Fourteenth Amendment precedent the state had a duty to protect the life and bodily integrity interest of the plaintiff.

4. Denial of a claim under §1983 will have the result of leaving Joshua without an adequate remedy.

5. The class of persons to whom §1983 protection should be accorded under the applicable "special relationship" test is narrow, and their need for protection is great.

6. Recognition of the plaintiff's right to proceed under §1983 will not distort social work practice. Rather, it will create an appropriate deterrent to indifference to danger to vulnerable children.

7. Given the nature of the legal and factual issues at stake, the federal courts are the only appropriate forum for this suit to redress a violation of constitutional rights.

ARGUMENT

The Case Below

This case arose from life-threatening injuries inflicted upon four-year-old Joshua DeShaney ("Joshua") by his father Randy DeShaney ("DeShaney"), and from the failure of the Winnebago Department of Social Services (the "Department") and social worker Ann Kemmeter ("Kemmeter") to

make good faith efforts to protect Joshua against such harm. Joshua suffered severe brain damage as a result. He most likely will be institutionalized for life.

Joshua, by his guardian ad litem, and his mother, Melody DeShaney, brought suit against Kemmeter, the Department and Winnebago County. The suit charged the defendants with having deprived Joshua of his liberty without due process of law, in violation of 42 U.S.C. §1983. The United States District Court of Wisconsin dismissed the action on summary judgment. The Seventh Circuit in DeShaney v. Winnebago County Department of Social Services, 812 F.2d 298 (1987), affirmed the dismissal.

MCCY contends that the Circuit Court's opinion was based on an

erroneous view of the facts about child abuse cases in general and this case in particular and represents a misapplication of law under §1983 and the Fourteenth Amendment. The plaintiff has a cognizable claim. As the underlying facts are in dispute, the grant of summary judgment was in error.

Structure of the Argument

The principal issue before the Court is the existence of a Fourteenth Amendment duty of the agents of the state to act in good faith to protect Joshua DeShaney. MCCY will discuss the relevant facts of this case and of child abuse in general and demonstrate that in light of these factors, as discussed herein, a Fourteenth Amendment duty must exist.

Furthermore, MCCY believes that the basic standards of social work

practice for child abuse cases are appropriate for litigation in federal court, with the aid of expert testimony. MCCY will demonstrate, in the context the facts of the case, there was a gross and obvious failure to follow basic criteria of child abuse investigation and intervention.

The Pattern of Child Abuse

Although physical and sexual abuse of children surely dates back to pre-historic times, it is only in recent times that our culture has recognized child abuse as endemic in all human societies.

The pattern of behavior of parents that leads to child abuse has become quite well understood.

> A review of the literature relating to the emotional and personality characteristics of child abusers reveals a recurring pattern. Child abusers

> are often described as immature, self-centered, emotionally starved, and having unmet dependence needs... [M]any abusers feel inadequate or incompetent in their particular role.
>
> Most child abuse incidents occur under conditions of accumulated stress in which the abuser feels overwhelmed and unable to cope with his or her problems... The abuser out of frustration explodes with violence which is directed toward a child in a futile attempt to cope with his or her stressful situation. Any child is a target under these circumstances. [citations omitted]...

Bommer, Goodgion, Pease and Zmud, Development of an Information System for the Child Abuse and Neglect Service System 13(4), COMMUNITY MENTAL HEALTH JOURNAL 333, 334 (1977).

It is hard to imagine any human condition more helpless than that of the abused young child. Children who

are the subject of abuse are totally isolated. They live in a world of terror and pain. Often child abusers successfully intimidate the children into refraining from alerting outside authorities to their plight, even when the children are old enough to do so. See, e.g., Doe v. New York City Department of Social Services, 649 F.2d 134, 138 (2d Cir. 1981).

Toddlers, such as four-year-old Joshua, are especially vulnerable because they rarely have contact with persons or institutions outside the family, except as permitted by their parents. They obviously cannot protect themselves, and they cannot escape from their violent caretakers.

Physical abuse has a profoundly adverse effect on the child's ability to feel and to function as a healthy

human being. Even infants and toddlers are affected by serious abuse, and become conditioned to acceptance of their mistreatment.

> [An] outstanding characteristic of abused infants (and of older children too) is their passive compliance and acceptance of whatever happens to them or is expected of them; ... They appear very stoic, listless, apathetic children who display little affect. It seems that some children learn very young that their best hope of getting food and care in a hostile or chaotic environment where parents are preoccupied with their own needs seems to be total submission to their parents' wishes.

Jones, Characteristics and Needs of Abused and Neglected Children, in SOCIAL WORK WITH ABUSED AND NEGLECTED CHILDREN 79, 81 (K. Faller ed. 1981).

The Child Protection System

Every state in the United States, the District of Columbia and all United

States territories have child protective service systems. Thompson, Civil Suit: An Abused Child's Only Protection, 6 PROBATE LAW JOURNAL 85, 86 (1984). In all state systems, child abuse reports are followed by investigation by social workers and intervention if appropriate.

The Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101 et seq., enacted in 1974, requires states to have child abuse and neglect reporting laws. In addition, the states are required to provide for prompt investigation to substantiate the accuracy of child abuse reports and must provide immediate action to protect the health and welfare of abused and neglected children. 42 U.S.C. §5103(b)(2)(c); 45 C.F.R. §1340.24(d). This action must include

the provision of emergency services (such as caretaker, homemaker, or medical services; multidisciplinary team review; and appropriate court action) to protect the child. 45 C.F.R. §1340.14(f). See also 42 U.S.C. §5103(b)(2)(D) (requiring adequate training for protective service workers).

The Wisconsin child abuse reporting law is representative of laws in other states, and follows the pattern set forth in the Child Abuse and Treatment Act. The Wisconsin Children's Code, §48.981, requires the Department to respond to reports of child abuse with an immediate investigation when there is reason to suspect that a child's health or safety is in immediate danger. The county department must initiate a diligent

investigation within twenty-four hours of receiving a report and must determine whether the child is in need of protective services. If services are needed, they are to be provided.

The State's Actions in Joshua's Case Failed to Meet Basic Norms of Case Practice

In the case below, the Seventh Circuit concluded that the Department and Kemmeter were not responsible for Joshua's welfare, and did not contribute to Joshua's peril. As will be shown herein, that premise is incorrect.

Moreover, the Circuit Court implied that the standards governing protective service cases are somehow unfit for litigation in a federal court. In fact, the standards are clear, and can be proven to the trier of fact by expert testimony admitted

under Fed. R. Evid. 701 through 705, just as in other cases.

Basic criteria and practices for recognizing and responding to child abuse are the core of the training of a protective service worker. These clear standards were ignored in Joshua DeShaney's case. Indeed, to one familiar with abusing families and children, the case of Joshua DeShaney showed many red flags of serious abuse and of great danger to the child. Kemmeter's own case record shows her awareness of the indicators of abuse and the fact that Joshua was being battered repeatedly. Yet Kemmeter did not take any good faith steps to help and protect Joshua.

1. Failure to Seek Medical Diagnosis of Joshua's Head Injuries

The most important rule of practice which Kemmeter violated in Joshua's case is the need for medical diagnosis of repeated serious traumatic injury. Medical diagnosis is needed both for a reliable analysis and for evidence for court. Such diagnosis should be conducted with the consent of the parents if possible, or under court order if necessary.

As every protective services social worker knows, head injuries are the most dangerous result of child battering, and the most frequent medical cause of child abuse

deaths.[1] In children, "[a]ll head injuries have to be considered as potentially very serious because of possible damage to the brain and central nervous system". Faller, Bowden, Jones and Hildebrandt, Types of Child Abuse and Neglect, in SOCIAL WORK WITH ABUSED AND NEGLECTED CHILDREN 13, 20 (K. Faller ed. 1981) [hereinafter cited as Types of Child Abuse and

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[1] See Weston, The Pathology of Child Abuse, in THE BATTERED CHILD 61, 79-85 (R. Helfer and C. Kempe ed. 1974) [hereinafter cited as Pathology]. In a classic study, Weston examined the bodies of twenty-three young children killed by child abuse. Postmortem examination showed that each one had died of a cerebral hemorrhage. In nineteen of the children, repetitive traumatic head injury was obvious from external examination. In a great majority of the cases, the parents' initial story was that the child fell from furniture or down stairs. However, the great majority of the injuries in the study were, in fact, caused by blows from the hand or fist. Id.

Neglect]. Joshua had numerous head injuries which Kemmeter saw throughout her involvement with the case. (App. 104, 114, 117, 119, 121, 130, 131). More head scars and bruises were discovered by the hospital staff when Joshua was brought unconscious to the emergency room on March 8, 1984. (App. 126). These additional injuries would have been discovered and documented earlier if there had been an physical examination of Joshua by a doctor.

2. Failure to Follow-Up on Injuries to Joshua Inconsistent With His Parents' Description of Their Cause

At no time from Joshua's initial hospitalization on January 23, 1984, until his final life-threatening beating on March 8, 1984, did Kemmeter ever seek a medical determination of whether Joshua's injuries were consistent with his father's

description of the harm.[2] On the face of the record, there appear distinct discrepancies noted by Kemmeter between the purported cause of harm to Joshua and his physical appearance. (App. 114). Kemmeter noted on one occasion that Joshua had bruises all over his head and face severe enough to require outpatient treatment at a hospital. This was clearly inconsistent with the supposed cause, a fall in the bathroom of the DeShaney home. (App. 121).

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2 "There are certain 'red flags' signalling abuse or neglect that are useful for the social worker to understand. First an important indicator is an explanation given by the parents for an injury or condition of the child that does not fit the facts." Types of Child Abuse and Neglect at 13-14. One physician noted: "Confrontation of the parents by the usual obvious disparity between initial presenting story and the evidence as gathered by the medical investigator usually results in a slowly unfolding admission of misconduct." Pathology at 66.

3. Failure to Act When Confronted by Repeated Injuries

Another clear danger sign was Joshua's repeated suspicious injuries. A series of unexplained injuries is a classic indicator of child abuse.[3]

Similarly Kemmeter failed to have a doctor observe the apparent cigarette burns she observed on Joshua's body. (App. 119). Cigarette burns are susceptible of medical diagnosis and are a very common indicator of child abuse.

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3 "[C]hildren who are harmed intentionally often experience mistreatment repeatedly. They are likely to present with multiple injuries at various stages of healing and scars. While it may be plausible that a child will be injured accidentally a single time in a suspicious manner, it is much less likely that a child will have been injured in such a way several times." Types of Child Abuse and Neglect at 14.

4. Failure to Reconvene the Child Abuse Team

It is also astounding that after the child's second hospitalization for traumatic injury (and the second hospital report of child abuse), Kemmeter failed to reconvene the child abuse team to evaluate the child in the light of the repeated injuries and to devise a plan of action to protect the child.

5. Failure to Examine Joshua In Spite of Repeated Injuries

Kemmeter failed even to see the child at all on at least two of her visits to the DeShaney home. (App. 131, 132). This failure to examine a child at risk is contrary to the most fundamental norms of protective services case practice.

6. Failure to Respond to Evidence of Life-Threatening Injury

On March 7, 1984, the day before Joshua was brought injured and unconscious to the hospital, Kemmeter was informed by Marie, Randy's girlfriend and Joshua's primary caretaker, that Joshua had "fainted in the bathroom several days earlier for no apparent reason." (App. 132). As any protective social service worker must know, unexplained sudden fainting is very unusual for young children. In the context of all the head injuries known to Kemmeter, it was a clear indicator of serious danger to the child's life. Again, Kemmeter took no action; she made no attempt to secure prompt medical attention.

7. Failure to Take Due Account of Further Signs of An Abusive Home

Joshua's repeated injuries occurred in the context of a home that fits a classic pattern of child abuse behavior. Kemmeter's case record indicates that Randy DeShaney and his girlfriend Marie had unrealistically high expectations of Joshua, a sign of emotional immaturity in Randy and Marie, and a classic indicator of an abusive home.[4] (App. 118, 119). Kemmeter knew that Randy was battering Marie and therefore that violence was

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[4] "Studies of abusive parents have indicated clearly that one of the several major areas of difficulties is their unrealistic and inappropriately high expectation of performance from the child. These expectations often are due to the belief that the child is capable of meeting the parents' emotional needs." Kempe, Related Aspects in Child Psychology, in CHILD ABUSE AND NEGLECT: THE FAMILY AND THE COMMUNITY 64, 69 (R. Helfer and C. Kempe ed. 1976).

occurring in the family. (App. 120). Kemmeter also knew that a Head Start worker had found Joshua home alone, which is strong evidence of neglect. (App. 120). And Kemmeter had heard verbal threats by Randy and Marie against Joshua. (App. 119).

8. Failure to Provide Services or to Hold Randy DeShaney to the Terms of his Agreement With the Department

The handling of Joshua's case showed other serious deficiencies as well. Most important is the fact that nothing was done to improve the dynamics of the family or deal with the family problems that were leading to abuse. No therapy was provided. A written agreement was signed by Randy calling for Randy to receive counseling from the Department -- which he never received. (App. 114, 115). Randy also agreed in writing that Joshua would be

placed in the Head Start program -- an early learning program where Joshua would be seen by his teachers every day. That did not occur either. (App. 120). When Randy failed to abide by any of the terms of the agreement, nothing was done -- either to enforce it or to give Joshua more frequent and more intensive scrutiny.

9. Failure to Take Any Steps to Protect Joshua

As a minimum, Kemmeter should have obtained medical confirmation of the injuries to use as evidence needed to remove Joshua from the home. She did not do so. She could have taken Joshua into emergency custody, but did not do so. She could have taken Joshua's case back to Court, but did not do so. At the least, services should have been provided, including counseling for Randy and Marie, more frequent visits

from a social worker, daily visits from a parent aide[5] or protective day care.[6] On the face of the record, Kemmeter knew Joshua was at great peril (App. 108) and took no steps at all to address the danger to Joshua.

In sum, Kemmeter's handling of the case fell woefully short of the basic standards of child abuse investigation and intervention. Although the current record is not complete, there are certainly sufficient facts to support a

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[5] Parent aides are trained laypersons who visit abusing homes on a daily basis to assist in parenting and to help defuse family tension. They also monitor behavior toward the child in the home.

[6] Protective day care provides several hours of care daily to abused children. This service allows the child to be observed daily, and allows workers to build a relationship of trust with a child that permits inquiry into the causes of injuries that the child may show.

finding of deliberate indifference on behalf of Kemmeter.

The Responsibility of the State For The Plight of the Child

It is important to note that in a child protection system, the social worker (and his or her supervisors) preempt society's response to the abusive family. As both a legal and a practical matter, only the protective service agency can direct services to the abused child and the family. Other institutions who might intervene to protect a child, such as the police, hospitals, social service agencies, the child's school and church, are all inhibited from acting, because all believe that the social service agency is in charge.

Because the protective service agency has preempted the field, it, in fact, increases the child's isolation,

and thereby increases the danger to the child when its intervention is carried out in an inept and indifferent manner.

In November 1983, Joshua was hospitalized for a second time for a cut forehead, bloody nose, swollen ear, and bruises on both shoulders. The hospital could have sought help from a private agency or gone to the Court to seek protection for Joshua, or they could have contacted the police. Plainly the emergency room personnel did none of these things, because they shared the common belief that as long as abuse is reported to the protective service agency, they have no further responsibility to the abused child.

Moreover, it is well recognized that a seriously flawed intervention, such as that in the case at bar, can increase the threat of harm to the

child. Protective service interventions profoundly affect the dynamics of the family.

> It is crucial that the worker recognize that the protective service and/or treatment interventions may be crisis factors for the family. Thus initially professional involvement may exacerbate the family's problems rather than alleviate them.

Faller, Ziefert and Jones, Treatment, Planning, Process and Progress, in SOCIAL WORK WITH ABUSED AND NEGLECTED CHILDREN 60, 62-63 (K. Faller ed. 1981).

In the dynamics of an abusing family, the intervention of the social worker must be persistent enough to deter harm, and must be accompanied by support for the family through frequent visits and services. Intervention such as that in Joshua's case, where there was no follow-up and no services at

all, serves only to raise the abuser's sense of anxiety and intensify his feelings of inadequacy, the same feelings that fuel the urge to attack the child.

Under these circumstances, it would be inaccurate as a factual matter to allow the agents of the state to disclaim responsibility for the tragic result of official indifference.

Under Well-Recognized Precedents, the Plaintiff Should Be Accorded a §1983 Cause of Action

The nature of the state's intervention in Joshua's life, the risks that that intervention caused, and the state's assumption of the role of protector of Joshua's welfare all require the state to bear responsibility, under the Fourteenth Amendment, for his life and bodily integrity.

This Court has recognized that one of the liberties protected by the due process clause of the Fourteenth Amendment is the right to personal security when the state has undertaken to assure a person's safety. In Youngberg v. Romeo, 457 U.S. 307 (1982), a mentally retarded adult alleged that the state had responsibility for his physical safety and had failed to protect him from physical injury. The Court held that the plaintiff had a claim under §1983, holding that the "right to personal security constitutes a 'historic liberty interest' protected by the Due Process Clause." Id. at 315. The Court recognized the same right for school students, Ingraham v. Wright, 430 U.S. 651, 672-673 (1977), and prisoners. Hutto v. Finney, 437 U.S. 678 (1978).

Under the principles set forth in this case law, if the administrator of a mental hospital, by deliberate indifference, allowed a patient known to be violent to kill or maim other patients, the victims would surely have a due process claim. Practically speaking, there is no difference between that situation and a case in which a social worker, by deliberate indifference, allows a parent to kill or maim a child. In each case the victim is totally helpless, and the only possible source of aid is the state. In each case, the state has intentionally assumed the role of the protector of the victim. In each case, the indifference of the state to likely injury and death of a helpless victim is offensive to the fundamental values of our culture. While the Constitution

does not require that mental hospitals or protective services for abused children be provided, once they are provided, the Fourteenth Amendment sets minimal standards of civilized conduct for state action in both settings.

Abused children represent the absolute extreme case of a vulnerable group. Because the Fourteenth Amendment life and bodily integrity interests of abused children are completely dependent on the state, the federal courts should provide at least a minimal level of judicial scrutiny of the acts of the state after it recognizes their danger and becomes involved in their lives.

The Court Should Adopt An Appropriately Narrow Version of the Special Relationship Test

Several federal courts have allowed recovery in cases similar to

the case at bar on the basis of the "special relationship" doctrine. In Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985), the court found that a duty of constitutional dimension was created when a state protective services agency learned of "special danger" to the child. Id. at 510-511. A similar case is Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984). In that case, the court embraced the "special relationship" analysis, albeit in dictum.[7] The court wrote: "a right to affirmative protection need not be limited by a determination that there was a 'custodial relationship'." 747 F.2d at 194.

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[7] The court affirmed a dismissal of the action on the grounds of qualified immunity. Id. at 194-196.

MCCY believes that the test for a "special relationship" should be limited to those who are in genuine need of special protection, such as children and other incompetents who are known to be at serious risk of physical harm. The focus should be on the following factors: (a) danger to the victim; (b) the helplessness of the victim; (c) knowledge by the state of the threat to the victim; and (d) the assumption of the role of protector by the state. This narrowed approach will provide protection to those who need it most and will avoid undue expansion of §1983 lawsuits.

MCCY urges the Court to reject a formalistic approach in which liability turns on whether or not the state has legal custody of the child-plaintiff. Whether or not the state obtains legal

custody of a child is often a matter of happenstance, with little relation to the risk to the child. The state may have legal custody of an abandoned child placed with his or her grandparents, in a situation where there is no cause for special scrutiny of the home. Or the state may, as in Joshua's case, have assumed life-and-death responsibility for, but not custody of, a child receiving dangerous and repeated injury from his own parents. The Court should adopt a pragmatic approach focusing on whether the state has assumed responsibility for a child whom it knows is vulnerable and at risk.

Abused Children Have No Effective Remedy, Other Than A Lawsuit

The remedy provided under Wisconsin tort law is inadequate to provide the relief necessary for Joshua

DeShaney. Under Wisconsin law, the amount recoverable for claims against governmental bodies, officers and employees in any action founded on tort may not exceed $50,000. Wis. Stat. §893.80(3), No punitive damages are allowed. Id. $50,000 is woefully inadequate to provide relief for a child who has suffered permanent brain damage and who is confined for life to an institution for the retarded.

A §1983 remedy is necessary as well, because the state protective services systems in America are largely immune from oversight. Federal law requires that every child's case be confidential. 42 U.S.C. §5103(b)(2)(E). Wisconsin law provides the same. Wis. Stat. §48.981(7). Cases of gross failure are often buried in the agency's files. As every child

advocate knows, litigation has the power to throw light on social institutions affecting children that fail to fulfill their mission.

An inquiry of the Department's actions and policies, through the vehicle of this litigation, may be the only chance that abused children in Wisconsin may have for redress of systemic flaws of the child protection system. If that avenue of reform is closed, children will suffer needlessly.

The Cause of Action Will Not Unduly Interfere With Social Work Case Practice

The Circuit Court argued that social workers will be placed on a "razor's edge, where if it terminates parental rights it is exposed to a section 1983 suit ... by the parent and if it fails to terminate those rights it is exposed to a section 1983 suit by

the child." 812 F.2d at 304. The assertion of this alleged dichotomy is wrong.

Under well-established principles, a worker, or the state, will only have §1983 liability when there has been "deliberate indifference" to the fate of the child. See Estelle v. Gamble, 429 U.S. 97, 106 (1976) (the Supreme Court applied the "deliberate indifference" standard in connection with a violation of the Eighth Amendment). See also Davidson v. Cannon, 474 U.S. 344, 347 (1986) (the Court held that a showing of mere negligence was insufficient to invoke compensation under §1983). Good faith error or simple negligence will not, and should not, lead to liability. Only very clear cases of violation of the basic rules of social work practice

in cases of manifest danger to children will survive a motion for summary judgment.

Rather than a "razor's edge", there is in fact a broad range of good faith protection for social workers and protective services agencies. Only in extreme cases, as, for example, when the agent of the state recklessly removes a child from its parents, or when by deliberate indifference it allows a child to be seriously harmed or killed, will there be liability. This is plainly the appropriate standard.

MCCY does not believe that this standard will distort social work practice or lead to automatic removal of children from their home in every case of reported abuse. Good social workers will continue to do good social

work. Rather, the §1983 action will serve as a deterrent to deliberate indifference to the danger to abused children, and will thereby provide protection for the nation's children.

The Federal Courts Are The Appropriate Forum For This Case

All of the criteria and standards of social work practice discussed above are suitable for expert testimony -- testimony which would be quite simple, clear and direct. The suggestion of the Circuit Court that state courts are somehow specially competent to deal with these cases such as these is unfounded. 812 F.2d at 304. If anything, the reverse is true. Federal courts have played a significant role in children's rights litigation. E.g., Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983); Doe v. New York City Dept. of Social Services, 709 F.2d 782 (2d

Cir. 1983); Doe v. Klein, 599 F.2d 338 (9th Cir. 1979); Youakim v. Miller, 562 F.2d 483 (7th Cir. 1977). Moreover, as is discussed above, child protection is regulated by federal law. And there is obviously no need for the trial court to have its own "staff of social workers" (as the Circuit Court suggests at 812 F.2d at 304) to try a case such as this one. Moreover because cases like this one involve the protection of federal rights, a federal forum is obviously appropriate.

CONCLUSION

For the foregoing reasons, the decision below should be reversed, and the case should be allowed to proceed to trial.

The grant of summary judgment, affirmed by the Circuit Court, should be reversed, and the case should be allowed to proceed to a trial on the merits.

Respectfully submitted,

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